Supreme Court, U.S.
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No. 02-52

IN THE

Supreme Court of the United States

CONSOLIDATED COAL COMPANY, *et al.*,

Petitioners,

v.

C.L. RITTER LUMBER COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM R. RAKES
Counsel of Record
J. SCOTT SEXTON
MONICA TAYLOR MONDAY
GENTRY LOCKE RAKES & MOORE
Attorneys for Respondents
P.O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300

175534

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT PURSUANT TO RULE 29.6

No corporate respondent has a parent company and no publicly held company owns 10% or more of the stock of any such respondent.

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The Respondents submit their Opposition to the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). For the reasons set forth below, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

The recitation of facts in the Fourth Circuit's opinion accurately sets forth the facts at issue. Pet. App. A at 4a-5a.[1] There are twelve sets of respondents whose claims arise out of leases of coalbed methane gas which they own and lease to the Petitioners in Buchanan County, Virginia. For the first time since this case began, Petitioners now claim that the terms of these leases are "widely varying." Pet. at 4.[2] This is incorrect. Each of the leases relates to one of two adjacent gas producing operations in Buchanan County — the Pocahontas Gas Partnership ("PGP") field and the Buchanan Production Company ("BPC") field. At times, both the PGP field and the BPC field have been owned by the same ultimate parent company, Dupont. Each of these similar leases, requires the petitioners to pay the respondents a royalty of one-eighth of the sales price on gas produced, minus specified deductions. PGP and BPC jointly built a pipeline to transport the gas out of Buchanan County; and they deducted the same charge for transportation on the pipeline. PGP and BPC used the same methodology to calculate the additional deductions from royalty for gathering and compressing the gas.

1. References to the Appendix to the Petition for a Writ of Certiorari will be denoted, "Pet. App. at ___."

2. References to the Petition for a Writ of Certiorari will be denoted, "Pet. at ___."

The twelve sets of respondents filed a joint complaint in 1997 asserting their respective claims in separate counts against the appropriate lessee, PGP or BPC (and the partners to these entities) because of the similarity in the leases, the deductions, and the common complaint about charges on the jointly-owned pipeline. The issue was whether the respondents had been over charged for costs associated with gathering and transporting the gas. No petitioner objected to the joinder of the different claims into one Complaint.

Following a lengthy trial, a jury returned verdicts for Respondents. Petitioners collectively filed voluminous post-trial motions on the merits of the case. When these motions were denied and judgment was finally entered, the respondents jointly filed a motion for relief from the judgment and to dismiss, citing *for the first time* a lack of complete diversity of citizenship. The petitioners asserted that three of the respondents, John Irvin, Carol Irvin and, consequently, the entity in which they were partners, Levisa Coal Company, were Texas residents (the "Texas Respondents"). Pet. App. A at 5a. Petitioners further asserted that Petitioner Conoco, Inc. had its principal place of business in Texas, so consequently, its partnership, PGP, was also a Texas resident. *Id.*

In their statement of the case, Petitioners imply that they were prompt in the filing of their jurisdiction motion by stating that they filed the motion "*after* learning that three plaintiffs and two defendants in the case were citizens of the same state." Pet. at 4. It is true that they filed it *after* learning of it, but it was *years after.* At oral argument in the Fourth Circuit, Petitioner's attorney conceded that the petitioners may have been aware of this jurisdictional problem even at the *beginning* of this litigation. Pet. App. A at 5a. The Fourth Circuit suggested in its opinion that this sort of procedural stealth is *"unacceptable gamesmanship."* Pet. App. A at 5a, note 1.

In response to Petitioners' motion to dismiss, Respondents asserted that Conoco was a Delaware Corporation with its principal place of business in Delaware; Respondents had relied on Conoco's official filings with the Virginia State Corporation Commission and the Delaware Secretary of State, listing Delaware as its principal place of business. Pet. App. B at 15a. Respondents also filed a timely motion under FED. R. CIV. P. 21 and 59 seeking to sever the one count claim by the Texas Respondents from all of the other claims. As the Fourth Circuit noted in its opinion, "[t]his was possible because none of the Texas Plaintiffs asserted claims against any of the Texas Defendants." Pet. App. A at 5a.

On January 30, 2001, the district court issued a Memorandum Opinion rejecting Respondents' assertion that Conoco had a Delaware place of business, noting that this was an issue on which Respondents had the burden of proof, and Respondents had failed to establish that Conoco had its "nerve center" in Delaware. Pet. App. B at 13a-17a. However, the district court agreed that Respondents' Rule 21 motion to sever the Texas Respondents' claim "would alleviate any jurisdictional concern." Pet. App. A at 5a. The district court held:

> Here, the facts weigh heavily in favor of curing the jurisdictional defect by granting Plaintiffs' motion to amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments. In their second amended complaint, Plaintiffs methodically set out each individual claim, carefully indicating which plaintiffs were suing which defendants. In total, that complaint consisted of twelve counts, each of which contained specific plaintiffs, defendants, and a prayer for relief.

> Plaintiff Levisa's and its partners' claims are set forth in Count I, containing a separate demand for relief and asserting a claim for relief only against Buchanan Production Company, Appalachian Operators, and Appalachian Methane, Inc. (2d Am. Compl. ¶ 40.) Likewise, plaintiffs Levisa and its partners did not assert a single claim against the non-diverse defendants, Conoco and Pocahontas, and, if considered separately, there would be complete diversity as to each count in the second amended complaint.

Pet. App. B at 19a-19b.

The district court vacated the existing judgment, divided the lawsuit into two cases, and entered judgment in favor of the respondents in each of the cases. Pet. App. A at 5a. The case by the Texas Respondents against the non-Texas petitioners is referenced herein as the "Levisa Judgment." The petitioners appealed both the one count Levisa Judgment and the 11 count non-Levisa judgment to the Fourth Circuit where the appeals were consolidated and the district court was affirmed in each case.

REASONS FOR DENYING THE WRIT

I. There is no compelling reason to grant this petition because this Court has already held that defects in jurisdiction may be corrected after judgment under RULE 21.

Federal jurisdiction ordinarily depends on the facts as they exist at the time the complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). However, this Court has expressly and unequivocally held that the ability to drop a diversity spoiling party or claim under RULE 21, even at the appellate level, is an exception to this general rule. *Id.* In *Newman-Green*, this Court noted that "it is *well settled* that RULE 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, *even after judgment has been rendered*." *Id.* at 832 (emphasis added). The only issue remaining for this Court in *Newman-Green* was whether "the policies informing RULE 21 may apply equally to the courts of appeals." *Id.* This Court found that "[a]lmost every modern Court of Appeals faced with this issue has concluded that it has authority to dismiss a dispensable nondiverse party by virtue of RULE 21." *Id.* at 833. "Other courts have remanded the case to the district court with mandatory instructions to allow an amendment dismissing the nondiverse party in order to preserve diversity jurisdiction." *Id.* (citing *Jaser v. New York Property Ins. Underwriting Assn.*, 815 F.2d 240, 244 (2d Cir. 1987)). Thus, this Court has already affirmatively considered and decided that defects in diversity jurisdiction may be cured under RULE 21, even after judgment and even on appeal.

There is no conflict among the federal circuits on this issue, and the district court and Fourth Circuit did not depart

from the accepted usual course of judicial proceedings as required under SUP. CT. R. 10(a) for this Court to grant Petitioners' writ. In fact, all the circuits that have considered this issue agree that RULE 21 may be used to correct jurisdictional defects after judgment; and, this is no surprise in light of this Court's clear precedent in *Newman Green*. *See Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (stating that ". . . a party *or claim* whose presence deprives the court of jurisdiction may be dropped *or severed* from the action . . . And motions to do so may be made even after entry of judgment") (emphasis added); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1154 (9th Cir. 1998) (finding that courts may remove a nondiverse party in order to perfect retroactively the district court's original jurisdiction); *Lennon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987) (stating ". . . it is now settled in this circuit that . . . we may dismiss a dispensable, non-diverse party in order to perfect retroactively the district court's original jurisdiction").

Petitioners attempt to distinguish this Court's ruling in *Newman-Green* by claiming that it applies only to RULE 21 *dropping* of parties or claims, not to Rule 21 *severance* of parties or claims. Pet. at 10-11. Thus, they argue that the district court only had the option of dismissing the Levisa respondents under RULE 21 and *Newman-Green*. Whether the district court dropped the Texas Respondents from the case or severed their claim, the result was the same as to the remaining non-Levisa case and judgment. Therefore, the petitioners' argument has no impact whatsoever on the non-Levisa judgment; and it cannot serve as a grounds for certiorari on that judgment. At most it could serve as a basis for petition on the Levisa Judgment, with the issue being

simply whether the district court had the discretion to sever the case under RULE 21 rather than dismissing it under RULE 21 as they now suggest the court should have done.

On this latter point, however, the petitioners never made an argument to the district court that the Texas Respondents should be dropped rather than severed. On the contrary, they argued below that the Texas Respondents could *not* be dropped. Petitioners specifically argued in the district court that "[t]he non-diverse defendants cannot be dropped from this action." Supplemental Appendix in Circuit Court at 3. Now, the petitioners attempt to criticize the district court for severing rather than dropping the Levisa parties and their claim. Having taken a contrary position below, they cannot now be heard to complain about the district court's action.

Moreover, the district court considered the precise holding of *Newman-Green* and stated, "[i]ndeed, as both the authority to drop a party and to sever a claim stems from RULE 21, the court finds that one method for correcting the jurisdictional defect should be no more or less favored that the other." Pet. App. B at 21a. The district court also quoted precedent from the Fourth Circuit that specifically provided that "a *party or claim* whose presence deprives the court of jurisdiction may be *dropped or severed* from the action," and "motions to do so may be made even after entry of judgment." Pet. App. B at 21a (quoting *Koehler*, 152 F.2d at 308).

The Fourth Circuit considered Petitioners' argument on this point, finding:

> Here, as in *Newman-Green*, the remedy applied by the court was authorized by the Federal Rules of Civil Procedure. And here, as in *Newman-*

> *Green*, this remedy resulted in a trial unit over which the court could validly exercise jurisdiction. *The specific nature of the remedy implicates the discretion of the court, not its power to act.*

Pet. App. A at 8a (emphasis added).

Both the district court and the Fourth Circuit were correct; and it is an exercise in sophistry for the petitioners to claim error by straining at the difference between dropping and severing claims under RULE 21. This Court in *Newman-Green* identified Rule 21 as the basis for its ruling; and RULE 21 plainly provides for either dropping *or* severing parties and claims. There is simply no reason to bifurcate RULE 21 and impose a "drop but don't sever" requirement on the ability of a court to cure jurisdictional defects.

It is a tremendous stretch by Petitioners to argue that the issue in this case is somehow a new issue for this Court because it requires the application of the words "sever" and "claims" in Rule 21 as opposed to the words "drop" and "parties" in RULE 21. Whether to drop or sever claims or parties (if at all) is a matter of judicial discretion that is best left to the discretion of the district court, but that this Court has held may be exercised even by the appellate courts. Accordingly, this Court should deny the petition because the Fourth Circuit's affirmation of the relief granted by the district court under Rule 21 was authorized by the language of RULE 21 and the clear precedent of this Court as well as that of Fourth Circuit and other circuit courts that have considered similar issues.

II. The district court's factual finding of no prejudice is not a genuine grounds for certiorari because this is an issue of discretion which was presented to the district court, considered, rejected, and then affirmed on appeal.

As a "second" reason for seeking a writ from this Court, the petitioners claim that they have been prejudiced by the district court's actions and that the Fourth Circuit erred in refusing to reverse on this ground. The district court specifically considered this Court's directive in *Newman-Green* that care should be exercised to determine that no prejudice results to any of the parties. The district court found that the "facts weigh heavily in favor of curing the jurisdictional defect"; and "[h]ere, amending the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments does not prejudice any of the parties." Pet. App. B at 21a-22a. This was particularly true in this case where the jury returned a separate verdict amount in favor of the Texas Respondents against the non-Texas Petitioners. Pet. App. B at 21a.

The Fourth Circuit approved the district court's factual finding that Petitioners suffered no prejudice. It properly reviewed the district court's decision under RULE 21, stating, "*. . . we do not hesitate to uphold the exercise of discretion here* . . . the district court found no prejudice, and that court was in a better position to make this determination." Pet. App. A at 8a (emphasis added).

Accordingly, Petitioners' "second" reason for seeking writ of certiorari from this Court, prejudice, is even weaker than their first reason — the purported chasm between the words "drop" and "sever" in the same RULE 21. As a factual

finding made by the district court in the exercise of its discretion, the issue of prejudice does not justify this Court's exercise of its supervisory powers.

CONCLUSION

For all of the forgoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM R. RAKES
Counsel of Record
J. SCOTT SEXTON
MONICA TAYLOR MONDAY
GENTRY LOCKE RAKES & MOORE
Attorneys for Respondents
P.O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300